
U.S. Department of Labor
Office of Administrative Law Judges
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DATE: SEP 25 1992

CASE NO.: 91-ERA-2

IN THE MATTER OF

MICHAEL R. CROSIER,
Complainant

vs.

PORTLAND GENERAL ELECTRIC CO.,
Respondent.

Appearances:

MICHAEL R. CROSIER,
Pro Se

THOMAS W. MACLANE, ESQ.
PAINE, HAMBLEN, COFFIN, BROOKE & MILLER
For the Respondent

Before: Edward C. Burch,
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DENYING THE COMPLAINT

This proceeding arises under the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. Section 5801, et *seq.,* (hereinafter "ERA"), and its implementing regulations, Title 29 Code of Federal Regulations Part 24. The Act states in pertinent part:

> No employer, including a commission licensee, or a contractor of a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)
> (1) commenced, caused to be commenced, or is about

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> to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement, imposed under this Act or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding or;
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

42 U.S.C. 5851.

PROCEDURAL HISTORY

On September 7, 1990, Michael R. Crosier (hereinafter "Complainant") filed an employment discrimination complaint with the Secretary of Labor against Portland General Electric Company (hereinafter "P.G.E." or "Respondent"). Following an investigation by the Department of Labor Employment Standards Administration Wage and Hour Division, the District Director notified the Complainant by letter dated September 27, 1990 that the Complainant's allegations were unprovable because the enumerated complaints were "not related to any actual or contemplated Whistleblower activities", and "[y]our denial to access to the plant was revoked by P.G.E. for other reasons." (RX:21).[1] Complainant was advised of his right to request a formal hearing by filing such request by telegram within 5 calendar days. On October 5, 1990, Complainant sent a telegram to the Office of Administrative Law Judges appealing the decision of the District Director and requesting a formal hearing.

A formal hearing was scheduled for November 30, 1990. On November 23, 1990, Complainant waived his right to formal hearing within the time specified under the statute, and a Continuance was granted. Various Motions were made and Orders granted regarding various discovery and procedural matters on February 22, 1991, and March 4, 1991. A second Motion for Continuance was granted on March 3, 1991 followed by more discovery Orders on June 25, 1991. The case was again set for hearing on April 8, 1992. On April 1, 1992, Motions for Summary Judgment, Continuance, Change of Venue, and Dismissal were denied. Hearing was held on April 8, 1992 in Spokane, Washington; however Complainant did not appear. An Order To Show Cause was issued. Complainant responded with medical evidence that he was injured and unable to attend the hearing. Hearing was again re-scheduled for August 11, 1992. On July 22, 1992, the court denied

and Ordered that Respondent's Motion For Sanctions would be ruled upon at the scheduled hearing. On August 6, 1992, the court Ordered that Complainant's First and Second Motions for Sanctions be denied and that all further motions be reserved until the time of trial.

The formal hearing on this case was held as scheduled on August 11, 1992 in Richland, Washington. The parties were afforded the opportunity to present evidence and to submit argument. At the opening of the proceedings, Complainant again motioned for a continuance which was denied. (TR:5,7). Complainant's exhibits A-Z were admitted, excluding all unbound documents, without objection. (TR:15-40). Complainant then rested his case. (TR:43). Respondent's Motion To Dismiss was denied. (TR:43-46). Respondent's exhibits 1-21 and 23-33 were admitted without objection. (TR:49).

STATEMENT OF FACTS

In June of 1990, Complainant was employed by Pacific Engineering Corporation ("PEC"). (TR:11, 12). Respondent is a licensee of the Nuclear Regulatory Commission ("NRC"). Pursuant to a contract between PEC and Respondent, Complainant began working approximately April 24, 1990 as a scheduler under the supervision of Respondent's employee, Mr. Michael Lorden at the Trojan Nuclear Power Plant ("Trojan"). (TR:13, 67).

According to testimony, Mr. Lorden supervised the development and maintenance of schedules for outages, or shutdowns, at Trojan. (TR:64, 67). At the time of the events at issue in this case, Mr. Lorden's staff consisted of Mr. Harry Anderson, a scheduler and employee of Respondent; Mr. Bill Pike, a scheduler and contract employee; Mr. Tague, also a scheduler and contract employee; and Mr. Don Fleetwood, deputy lead scheduler and employee of Respondent. (TR:65-66; RX:2:55). Upon receipt of approval from management, Mr. Lorden hired four additional contractors to assist in scheduling future outages: Complainant, Ms. Theresa Wilson, Mr. Art Ford, and Mr. Frederick Giard. (TR:67).

New computer terminals were procured and additional trailer office space was set up for the new contract employees. Mr. Lorden initially assigned Complainant and the three other new contractors to work under the supervision of Mr. Anderson to begin developing generic outage schedules. (TR:68-69; RX:2:60). The contract employees were instructed that all computer terminals were the property of Respondent and none of the terminals were assigned to any individual employee; rather,

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all employees were expected to share access to all terminals. Each employee had a "password"; however, all terminals were to be accessible-and available to all employees, and employees were not to use the computers for storing personal data. (TR:75; RX:2:60).

According to Mr. Anderson, Ms. Wilson, Mr. Ford, and Mr. Giard, Complainant quickly became possessive about a computer terminal which he had selected as "his." Complainant was reportedly suspicious that his co-workers were tampering with "his" computer, and Complainant placed a secret password on "his" terminal which prevented the others from using it. When instructed by Mr. Lorden to remove the secret password from that terminal, Complainant became angry, accused his co-workers of incompetence, and expressed a need to protect himself. However, Mr. Anderson reported that, in his opinion, Complainant's computer problems were due to his own lack of expertise and not the tampering of others. Complainant also discussed his suspicions of alleged tampering with Mr. Tague, who shared Mr. Anderson's opinion that Complainant's computer problems were not the result of intentional tampering, but rather the result of inadvertent employee error. (Mr. Lorden testified that, although Complainant asserted that "people" were tampering with "his" computer, Complainant did not mention specifically who those "people" were, and no evidence of deliberate tampering was ever discovered.) Mr. Anderson also observed and reported to Mr. Lorden that Complainant regularly displayed inappropriate anger towards his co-workers and was critical, insulting, and uncooperative with Mr. Anderson and his co-workers. (TR:68-77, 82, 125-26, 133; RX:2:54-61).

Mr. Anderson expressed concern to Mr. Lorden about Complainant's emotional stability, "temper outbursts", and seeming inability to get along with his co-workers. (TR:69-71). Mr. Lorden met with Mr. Ford, Mr. Giard, and Ms. Wilson who, as a result of Complainant's behavior, were experiencing fears for their personal and professional well-being. All of Complainant's co-workers reported feeling physically intimidated by Complainant (TR:71; RX:2:54, 57-58). Mr. Lorden, Mr. Anderson, and Ms. Wilson noted that Complainant talked repeatedly about guns; that Complainant alleged to have been employed by the FBI and the CIA, to have served in all four branches of the armed services, to have been shot down as a jet fighter pilot twice, to have highly placed friends within Respondent's management; and that Complainant seemed to enjoy telling bloody stories. (TR:70; RX:1 (Affidavit of Theresa Wilson); RX:2:61-62, 66-68). Complainant allegedly was particularly verbally abusive towards Ms. Wilson and reportedly threatened her with physical violence on more than one occasion. (RX:1 (Affidavit of Theresa Wilson); RX:1 (Report of Interview with Theresa Wilson); RX:2:66-68).

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Mr. Lorden then raised his concerns with Complainant about Complainant's temper. Complainant allegedly responded that his co-workers were incompetent. (TR:71-72, 80-81).

After three or four weeks, Mr. Lorden assigned Complainant to work on a new project with Mr. Fleetwood in a work area shared by Mr. Lorden and Mr. Fleetwood partly in order to better observe Complainant's work and behavior. (TR:72-73). Mr. Lorden testified that Complainant's work was not timely and that Complainant was absent from the work site for extended periods during the work day. (TR:73-74). During this time, Mr. Lorden also received complaints from Mr. Fleetwood that Complainant had removed items from Mr. Fleetwood's desk. (TR:81, RX: 2:55). Mr. Lorden also received a report from a secretary that Complainant had been observed going through files in Mr. Lorden's desk. (TR:81).

In July of 1990, Mr. Lorden received a telephone call from Mr. Magnusson, a member of security management at Trojan, who reported receiving a complaint through Respondent's Excellence Response Program[2] about Complainant's behavior. Mr. Magnusson suggested that Mr. Lorden formally observe Complainant's behavior and prepare an A0 8-13 Form.[3] (TR:82-85). At that time, Mr. Magnusson did not discuss with Mr. Lorden the nature of the alleged behavior which prompted the complaint. (TR:85). Mr. Lorden followed directions on the standardized Form and completed the Form by checking boxes and making no judgments or comments. (TR:86). In filling out the Form, Mr. Lorden considered his own observations of Complainant and the reports about Complainant which he had received from each employee under his supervision. (TR:88). Mr. Lorden returned the completed Form to Mr. Magnusson and discussed the results: Mr. Lorden had checked a certain number of boxes which compelled notification of Respondent's plant psychologist. (TR:87). The plant psychologist, Dr. Larry S. Friedman, Ph.D., was contacted and ah appointment arranged for Complainant to be interviewed by Dr. Friedman. (TR:89). Mr. Lorden informed Complainant of the scheduled appointment with Dr. Friedman and advised Complainant to take his personal belongings with him. (TR:90).

At Respondent's request, Complainant was interviewed on July 13, 1990 by Dr. Friedman, a licensed clinical psychologist practicing in Portland, Oregon. (TR:148). Dr. Friedman testified that he has performed psychological screening of employees pursuant to Respondent's Administrative Order, *supra,* for five years and has examined many employees. (TR:151, 161). Dr. Friedman noted Complainant's "aggressive and intimidating" manner and loud and rapid speech. (TR:153-54). Dr. Friedman testified that Complainant represented himself

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as "agent of others of power and influence, that he had direct and regular contacts with senior executives of [Respondent]." (TR:154-55). However, when Dr. Friedman asked Complainant for names and specific details of Complainant's statements, Complainant "would become very vague and evasive, and fail to respond to my questions, and . . . in fact, offer very little information." (TR:155). According to Dr. Friedman, at no time did Complainant report any health or safety concerns, report any contact with the NRC, or indicate any intention to report to the NRC or any other regulatory agency. (TR:159).

Additionally, Dr. Friedman testified that Complainant "bragged" about intimidating other people and found it "fun." (TR:156). Because he found so many of Complainant's statements to be unreliable, Dr. Friedman concluded that Complainant should be immediately denied access to Respondent's secured facility. (TR:156).

According to Dr. Friedman, after informing Complainant of this conclusion, Complainant "suddenly" told Dr. Friedman that "several weeks earlier he had carried what he alleged to be a loaded .45 caliber pistol through the security at the plant and into the protected area." (TR:157). Complainant informed Dr. Friedman that Mr. Bill Pike had seen the gun in Complainant's briefcase. When Dr. Friedman asked Complainant what he had done with the gun, Complainant stated that he had carried it back out of the plant in his briefcase. (TR:158). While Complainant was still in his presence, Dr. Friedman first notified the security department of Complainant's allegation that a loaded handgun had been passed through security and then notified Respondent's managers of his recommendation that Complainant's access be revoked immediately. (TR:91, 160).

Based on his 1 1/2 hour interview with Complainant, Dr. Friedman testified that "in my clinical judgment these things were of sufficient magnitude to raise a serious question in my mind about severe psychopathology." (TR:159). In his July 16 written report to Respondent, Dr. Friedman opined:

> I believe that there is a significantly grandiose and paranoid character to [Complainant's] ideation, and I do not find his representation of "high-level" influence to be credible. Moreover, he has been accused by co-workers of being threatening and verbally abusive, and he acknowledged that he purposely engages in these behaviors to intimidate and manipulate others for whom he has "no respect". [sic] I believe that withdrawing unescorted access is the necessary and prudent thing to do at this time.

(RX:6; TR:15 8-159).

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Complainant then requested a visitor's badge to retrieve his personal effects. This request was denied by Respondent's plant manager. (TR:91). Complainant gave a list of his effects to Mr. Lorden and requested that Mr. Lorden give the listed items to Mr. Pike. Complainant then informed Mr. Lorden that he had brought a gun onto the site. (TR:92).

Approximately one week later, Mr. Lorden received a telephone call from Complainant who requested the return of a computer software package and his personal effects. (TR:93-94). Mr. Lorden, accompanied by Mr. Byron and Mr. Bachma, went through the data files of the computer terminal used by Complainant and Complainant's desk. Mr. Bachma, an information services employee, made efforts to find all personal data files belonging to Complainant; a few personal items were found and delivered to the front gate for pick up. (TR:95-96).

According to Mr. Lorden, at one time, Complainant expressed safety concerns about the number of hours being worked by employees in the scheduling department; however, Complainant never voiced any other health or safety concerns, mentioned any reporting activities, or expressed any intent to contact any regulatory agency. (TR:97-98). Mr. Lorden testified that, to his knowledge, the sole reason for Complainant's discharge was Complainant's disruptive behavior. (TR:98-99).

From July 19 through August 17, 1990, the NRC conducted a special inspection at the Trojan Plant into the report of an unauthorized firearm entering the plant's protected area. The inspection was conducted by Messrs. Roberts and Schaefer of the NRC. (CX:N:5, 7, 8, 10). On July 31, 1990, Complainant met with Messrs. Roberts and Schaefer at which time Complainant "expressed security and operational concerns related to the operation of the Trojan Plant." (CX:N:4). A Notice of Violation was issued to Respondent who instituted immediate corrective action. (CX:N:1, 11).

On July 30, 1990, Respondent received notification from the NRC of "allegations related to activities at your Trojan Plant" including: (1) access to manuals for security equipment; (2) security equipment deficiency; (3) long work shifts; (4) tampering with computer operations files; (5) corrupt hiring

practices leading to employment of technically unqualified personnel. (CX:N:2).

On August 22, 1990, Respondent notified Complainant by letter that "your authorization for unescorted access to the Trojan Nuclear Plant was suspended pending a security investigation into acts you had allegedly committed that posed substantial risks to plant security. . . . In consideration of findings in that investigation, a

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further investigation into pertinent aspects of your personal history, and the results of the behavioral observation interview conducted July 13, 1990, your authorization for unescorted access has been withdrawn." (CX:A:4).

On February 8, 1991, Complainant received a letter from Mr. Scarano of the NRC regarding completion of the NRC inquiry into Complainant's concerns. Mr. Scarano stated "that adequate corrective measures have been implemented in these areas. You have submitted no new information that would cause us to alter our earlier conclusions." (CX:N:5).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the entire record of this case and the applicable law. Where appropriate, consideration has been given to my observation of the appearance and demeanor of the witnesses. Each exhibit in the

record has been carefully considered, whether or not it is mentioned in this recommended decision and order.

Complainant asserts that he was in the process of preparing reports of safety violations committed by Respondent at Trojan, that Respondent was aware of this activity, that Respondent deliberately destroyed the computer files in which Complainant had stored these alleged reports, and that Complainant was dismissed from his employment solely in retaliation for Complainant's alleged reporting activities. (TR:172-73). Respondent maintains that it was unaware if in fact Complainant was engaged in any protected reporting activity and that the sol reason for Complainant's discharge was Complainant's aberrant behavior and consequent security risk. (TR:174-176).

In "whistleblower" proceedings, the complainant first must make a *prima facie* showing that protected activity motivated the respondent's decision to take adverse employment action. The burden of proof then shifts to the respondent to prove by a preponderance of the evidence that, if even part of the respondent's motive was unlawful, it was also motivated by the complainant's unprotected activity and would have taken adverse action against the complainant in any event for the unprotected activity alone. The burden of proof then returns to the complainant to establish that the reason offered by the respondent is pretext.[4]

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Elements of a *Prima Facie* Case Under Section 5851

In order to establish a *prima facie* case, the complainant must "how: (1) that he was engaged in protected activity; (2) that the respondent employer was aware of the protected activity; (3) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment because the employee participated in a protected activity. The complainant need only produce enough evidence, direct or circumstantial, to raise an inference of unlawful discrimination. *Mackowiak v. University Nuclear Systems, Inc.,* 735 F.2d 1159, 1162 (9th Cir. 1984) (quoting *DeFord v. Secretary of Labor,* 700 F.2d 281, 286 (6th Cir. 1983)); *McCuistion, supra* at 90.

Under the ERA, an employee is engaged in protected activity if he

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under this chapter . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter . . .; (2) testified or is about to testify in any such proceeding; or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purpose of this chapter . . . .

42 U.S.C. 5851(a).

Protected Activity

In the instant case, I find that Complainant was not engaged in a protected activity. Complainant's allegation that he was keeping a record of workplace health and safety violations at Respondent's facility is not supported by documentary evidence or testimony. Complainant offered no testimonial proof that he had commenced or was about to commence any activity described at 42 U.S.C. 5851(a).[5] Complainant offered into evidence correspondence with the NRC as proof of his allegedly protected activities. However, all the correspondence is dated after the date of Complainant's discharge from Respondent's facility. (TR:N). Furthermore, the correspondence does not document any intent on the part of Complainant to initiate proceedings against Respondent prior to the time of Respondent's adverse action.[6]

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Employer's Awareness

Upon review of the evidence, I find that Respondent was not aware of Complainant's alleged protected activity. Respondent offered the testimony of Mr. Lorden,- Complainant's supervisor, that Complainant did not make any safety complaints or prepare any written reports of his safety or security concerns. Mr. Lorden was aware of that Complainant was keeping personal files in his computer terminal and that Complainant alleged that his computer was being tampered with. However, Mr. Lorden testified that he did not know the content of Complainant's personal files and that no evidence was ever presented to him of any actual tampering or erasure of computer files as alleged by Complainant. (TR:95, 97-98, 126, 133). Respondent's witness, Dr. Friedman, also testified that at no time did Complainant indicate any intent to file safety or health complaints with the NRC or any other regulatory agency. (TR:159). The testimony of Respondent's witnesses was unrebutted and I found both witnesses to be credible.

I have found that Complainant was not engaged in any protected activity and that Respondent was not aware of

Complainant's allegedly protected activity. Therefore, I find that Complainant has failed to establish a *prima facie* case.

Causation - "Dual Motive" Test

Even assuming *arguendo* that Complainant has established that he was engaged in protected activity and that Respondent was aware of that activity, Complainant must also prove that the Respondent's discriminatory action arose because of the protected activity. *Mackowiak, supra* at 1162. Complainant must present "evidence sufficient to raise the inference that . . . protected acitivity was the likely reason for the adverse action." *Dartey v. Zack Company of Chicago,* 82-ERA-2 (Sec'y April 25, 1983) (quoting *Cohen* v. *Fred*

Mayer, *Inc.,* 686 F.2d 793, 796 (9th Cir. 1982)). Under *Mt. Healthy, supra,* once the employee shows that illegal motives played some part in the adverse action against the employee, the burden shifts to the employer to show that it would have discharged the employee even if he had not engaged in protected conduct. *See Mackowiak, supra* at 1164; *Darty, supra*.

In the instant case, I have found that Respondent was not aware of Complainant's allegedly protected

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activity. Therefore, no discriminatory intent can be imputed to Respondent. Complainant has not presented any direct evidence of discriminatory animus on the part of Respondent. Complainant has not presented any direct evidence that Respondent employees or managers had any retaliatory motive for his discharge. Complainant relies on mere allegations and the proximate timing of his discharge vis-a-vis the alleged protected conduct to support an inference of causation. I find the documentary evidence of record insufficient to support even an inference of causation.

I also find that Respondent has shown by a preponderance of the evidence that it would have discharged Complainant in any event on the basis of Complainant's aberrant behavior alone, thus satisfying the "dual motive" test set forth in *Mt. Healthy, supra.*

Respondent has shown a legitimate, non-discriminatory justification for discharging Complainant. Complainant's intimidating, disruptive, and uncooperative behavior are well documented in the record. I find that the evidence substantiates Respondent's perception of Complainant's behavior as aberrant. Respondent has established policy and implemented programs, the Excellence Response Program and the Administrative Order A0 8-13 Plant Security Behavioral Observation Training and Evaluation, for ensuring the safety and security of its nuclear facility. Respondent followed announced procedures in administrating these programs with respect to complaints about Complainant's behavior. RX:7). By the safety standards set forth in Respondent's policy, Complainant's behavior justified the discharge action taken against him.

Pretext

There is no dispute that Complainant engaged in conduct upon which Respondent relies for its justification. It is Complainant's burden to establish that Respondent was not in fact motivated by his behavior but by his protected activities. I have found that Complainant was not engaged in protected activity. Complainant has not proved that Respondent was aware of his protected activity. Complainant's disruptive behavior was discussed with him by his supervisor, Mr. Lorden, before he was discharged. Respondent has presented the unrebutted testimony of two credible witnesses that the sole reason for Complainant's discharge was his aberrant behavior. Respondent has demonstrated that Complainant's discharge was carried out according to established formal procedures to

ensure the safety and security of its nuclear facility. Thus, I conclude that Complainant has not shown that the reason stated by Respondent for Complainant's discharge is not the true

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reason.

Based on all the evidence presented, I find that Complainant has failed to prove that his discharge was discrimination prohibited by the Act. Accordingly, it is concluded that Complainant's complaint should be denied.

RECOMMENDED ORDER

It is hereby recommended that the complaint of Michael R. Crosier against Portland General Electric Company be denied.

EDWARD C. BURCH
Administrative Law Judge

ECB/kaf

[ENDNOTES]

[1]The following abbreviations are used herein: "TR" denotes hearing transcript; "CX" denotes Complainant's exhibits; "RX" denotes Respondent's exhibits.

[2]Respondent's Excellence Response Program is an in-house program for all employees which provides a means for employees to report their workplace concerns directly to upper management without going through their immediate supervisor or department manager. (TR:83).

[3]The A0 8-13 Form is described and contained in Respondent's Administrative Order, A0 8-13, Plant Security, Behavioral Observation, Training and Evaluation at RX:7. The Administrative Order describes the training of plant management personnel and procedures to be followed in evaluating suspect or aberrant employee behavior. The purpose of the Order is to implement the stated safety and security policy of preventing "the occurrence of sabotage or violence through early detection and correction of factors which might result in such behavior." The Order applies to both Respondent's employees and any contractors.

[4]Where, as here, the complainant contends that the respondent's motives were wholly retaliatory, and the respondent contends that its motives were wholly legitimate, neither party relies on a "dual motive" theory in advancing its case. In this circumstance, the Secretary has stated that the use of the "pretext" legal discrimination model appears

appropriate because it focuses on determining the employer's true motivation, rather than weighing competing motivations. *McCuistion v. Tennessee Valley Authority,* 89-ERA-6 (Sec'y Nov. 13, 1991) (referencing *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248 (1981)). However, in light of the decision of the Ninth Circuit Court of Appeals in *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984), the "dual motive" test set forth in *Mt. Healthy City School District v. Doyle,* 429 U.S. 274 (1977) is also applied to this case analysis.

[5]Complainant offered no testimonial proof on any issue at the hearing.

[6]I also note that a substantial portion of the documentary evidence offered by Complainant to substantiate his allegedly protected activities deals with the NRC investigation into the report of an unauthorized firearm entering the facility. This report was made by Respondent, and the subsequent NRC investigation and Notice of Violation were, therefore, initiated by Respondent and were not the result of any protected activity on the part of Complainant.